No. 92-609

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, PETITIONER

v.

JERRY J. NACHTIGAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. In our petition, we argued that the analysis applied by the Ninth Circuit cannot be reconciled with the analysis that this Court adopted in *Blanton* v. *City of North Las Vegas*, 489 U.S. 538 (1989). See Pet. 6-12. Respondent makes no effort to defend the Ninth Circuit's reasoning. Instead, he defends the Ninth Circuit's judgment on a ground that court did not adopt: He contends that the penalties a person could suffer if placed on probation, see 18 U.S.C. 3563, are sufficiently onerous that they "clearly reflect," *Blanton*, 489 U.S. at 543, a congressional judgment that the offense of operating a motor vehicle in a federal park while under the influence of alcohol, in violation of 36 C.F.R. 4.23(a)(1), although deemed by

statute as only a Class B misdemeanor, is nonetheless a "serious" offense, and therefore entitles him to a jury trial. Br. in Opp. 6-9. That argument is flawed in several respects.

First, no court of appeals has agreed with that submission. Indeed, it is inconsistent with the reasoning of every post-*Blanton* circuit court decision cited in our certiorari petition (at 12-14), and was explicitly rejected by the Fifth Circuit in *United States* v. *Paternostro*, 966 F.2d 907, 913 (1992). Second, respondent's submission is inconsistent with this Court's decision in *Blanton*. There, the Court explained that in determining whether an offense is "serious" and requires a jury trial, "[p]rimary emphasis * * * must be placed on the maximum authorized period of incarceration. Penalties such as *probation* or a fine may engender 'a significant infringement of personal freedom,' but they cannot approximate in severity the loss of liberty that a prison term entails." 489 U.S. at 542 (emphasis added; citation omitted). As we explained in the petition (at 8 n.6), the restrictions on a person's liberty that accompany probation are not commensurate with the severe deprivation of liberty resulting from imprisonment. Third, the implications of respondent's argument are sweeping. Under respondent's theory, *every* federal offense, no matter how trivial, would be subject to trial by jury, because a sentence of probation can be imposed on every defendant who is convicted of a misdemeanor or a petty offense. See 18 U.S.C. 3561(a). It cannot be the case that the possible conditions of probation that a court may impose for any federal misdemeanor or infraction convert every

such offense into a "serious" offense for jury trial purposes.

2. In our petition, we explained that the Ninth Circuit's decision was inconsistent with the post-*Blanton* decisions of six other circuits that have addressed jury trial questions. Under the analysis followed by those courts, a defendant who is charged with the misdemeanor at issue in this case would not have been entitled to a jury trial in any of those circuits. Pet. 12-14.

Respondent does not deny that the Ninth Circuit's analysis is irreconcilable with the analysis applied by those other circuits. Instead, he maintains that those courts are wrong, because they did not consider the possible disabilities that a person could suffer while on probation. Br. in Opp. 9-10. But that argument rests on the premise that conditions of probation are as onerous as the loss of liberty suffered by a prisoner, and that premise is inconsistent with *Blanton*.

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted and the judgment of the court of appeals should be summarily reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

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